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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

CENTER FOR BIOLOGICAL
DIVERSITY, et al.,

Plaintiffs,

v.

LT. GEN SCOTT A. SPELLMON, et
al.,

Defendants,

AMERICAN GAS ASSOCIATION,
et al.,

Defendant-Intervenor,

STATE OF MONTANA,

Defendant-Intervenor.

4:21-cv-00047-BMM

**Plaintiffs' Notice of
Supplemental Authority**

NOTICE OF SUPPLEMENTAL AUTHORITY

Pursuant to Local Rule 7.4, Plaintiffs respectfully submit this Notice of Supplemental Authority to alert the Court to the recent Ninth Circuit decision in *Environmental Defense Center v. Bureau of Ocean Energy Management*, No. 19-55526, 2022 WL 1816515 (9th Cir. June 3, 2022) (attached hereto). This decision is pertinent to Plaintiffs' argument (ECF No. 45 at 18-22) that site-specific consultation under Section 7 of the Endangered Species Act (ESA) cannot cure a failure to consult at the programmatic level. The decision also supports Plaintiffs' argument (ECF No. 78 at 1-8) that Plaintiffs have standing to challenge a programmatic action when the programmatic decision is made, even though site-specific actions have not yet commenced. Finally, the decision supports Plaintiffs' argument (ECF No. 45 at 27-49) that Defendants' Environmental Assessment (EA) for NWP 12 failed to take the requisite "hard look" under the National Environmental Policy Act (NEPA).

In *Environmental Defense Center*, the court held that the Bureau of Ocean Energy Management (the "Bureau") violated the ESA and NEPA for its decision allowing fracking for off-shore oil extraction. In reaching its decision, the court found that "procedural claims challenging an agency's . . . failure to consult under the ESA were ripe, even though site-specific proposals had not been issued," *id.* at *10 (citing *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 970-

71 (9th Cir. 2003)), and “rejected” the argument that “the ESA did not apply to programmatic documents that themselves did not ‘mandate any action.’” *Id.* at *21 (citing *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1055 (9th Cir. 1994)). Moreover, the court made clear that “[s]ite-specific review cannot cure a failure to consult at the programmatic level, and incremental-step consultation is inadequate to comply with the ESA.” *Id.* at *26 (citing *Conner v. Burford*, 848 F.3d 1441, 1455 (9th Cir. 1988)). The court also held that the Bureau failed to take the requisite “hard look” at impacts in violation of NEPA by ignoring evidence provided by plaintiffs and relying on incorrect assumptions about the frequency of impacts, noting that “conclusory assertions about insignificant impacts will not suffice” under NEPA, *id.* at *16, and rejected the position that regulation by another agency precluded consideration of impacts under NEPA, *id.* at *13-14. The court held the EA and Finding of No Significant Impact was arbitrary and capricious because it ran counter to the evidence before the agency. *Id.* at *12, 19.

The Ninth Circuit court’s decision in *Environmental Defense Center* therefore supports Plaintiffs’ arguments that it has standing to bring this claim for the Corps’ procedural ESA violation, that project-specific review cannot replace the need for programmatic consultation on Nationwide Permit 12, and that the Corps failed to take the “hard look” at impacts mandated by NEPA.

Respectfully submitted this 7th day of June, 2022.

/s/ Timothy M. Bechtold

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CERTIFICATE OF SERVICE

I certify that I served the foregoing brief on all counsel of record via the Court's CM/ECF system.

/s/ Doug Hayes